United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7330

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7330

BAY POINT CORP.,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff-Appellant
30 Rockefeller Plaza
New York, New York 10020

Of Counsel:

Richard G. Moser
Paulette M. Caldwell

3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7330

BAY POINT CORP.,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

This brief is submitted in reply to the defendant-appellee's brief in opposition to the plaintiff's appeal from (i) an order denying the plaintiff's motion for a voluntary discontinuance of this action without prejudice and (ii) an order dismissing this action with prejudice.

I

IT IS NOT TRUE THAT THE PLAINTIFF RESISTED DISCOVERY OVER A TWO-YEAR PERIOD OR FAILED TO COMPLY WITH A SERIES OF ORDERS OF THE DISTRICT COURT

The defendant bank's brief is an example of the time-worn technique of constant repetition of a series of exaggerated fictions, stated with such definiteness, vehemence and apparent conviction as to carry the reader into a land of make believe with the hope that he will become outraged by a collection of non-existent atrocities. Having succeeded with this tactic in the lower court, the defendant has decided to try it again on appeal.

The defendant bank charges the plaintiff with "adroit efforts at forum swapping, coupled with willful disregard of orders" of the Court, "manipulating the New Jersey proceedings--sidetracking of jurisdiction in this Court," "repeated and calculated failures to comply with outstanding orders" of the Court, acting "in bad faith," "recurrent failures over a two-year period" to submit to discovery, "open derogation of the jurisdiction of the Court," "deliberately thwarted discovery," "demonstrated disdain" for the Court, and "cavalier disregard of the discovery rules."

There is no basis whatever in the record or in fact for these charges. However, these tactics were

successful in inducing in the District Judge a feeling of outrage which caused him to commit the errors from which the plaintiff is appealing.

In its attempt to paint the plaintiff as resisting discovery over a two-year period, the defendant bank ignores the fact that this action, including discovery, was stayed for nine months during 1974. Furthermore, prior to the imposition of the stay, Mr. Achee was deposed on June 28, 1973 and July 10, 1973 and the plaintiff produced all documents requested by the defendant. However, the defendant made no attempt whatever to complete Mr. Achee's deposition during the eight months between July 10, 1973 and the imposition of the stay suspending discovery. Accordingly, in the two-year period alleged by the defendant seventeen months passed during which no action was taken to complete Mr. Achee's deposition.

The defendant states repeatedly that the plaintiff failed to comply with a "series" of orders by the District Court to complete discovery. This is also untrue. The only order of the District Court directing discovery was issued on April 24, 1975. Prior to that time, no order of any kind for the continuation of Mr. Achee's deposition was issued. It is true that the deposition was postponed several times during the five months between the resumption of discovery and the dismissal of this action, due in part to the death of Mr. Achee's mother, the frequent unavailability

of the defendant's and the plaintiff's counsel and the critical financial transactions in which Mr. Achee was engaged abroad. Nonetheless, there was no order of the Court in respect of any of those occasions. Moreover, other officers of the plaintiff were available who could easily have been substituted for Mr. Achee. The defendant's pretense that Mr. Achee's absence from the country was a serious frustration of the proceedings is absurd.

There is also no support in the record for the defendant Bank's claim that Mr. Achee's failure to appear was due to "willfulness, bad faith or fault" as required by Mr. Justice Harlan in Societe' Internationale v. Rogers, 357 U.S. 197, 28 Sup. Ct. 1087 (1958), as an indispensible prerequisite to the sanction of dismissal with prejudice. Whether or not the failure of a party to proceed is so serious, as to justify the extremely harsh sanction of dismissal with prejudice must be determined on the facts and circumstances of each case. Mr. Achee's failure to return from crucial negotiations abroad for the continuation of a deposition almost completed and long postponed by court order or mutual consent did not come anywhere near the degree of willfulness and bad faith required for such drastic action of the Court, particularly in light of the Court's refusal to consider the circumstances which prevented Mr. Achee from appearing.

II

THE PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE OF THIS ACTION WITHOUT PREJUDICE WAS TIMELY AND MADE ON THE RECOMMENDATION OF THE DISTRICT COURT

A mere reading of the description in the defendant's brief of the proceedings below makes it obvious that the case was in a state of utter confusion. This had been caused not by the plaintiff, but by the following events: institution in the New Jersey Superior Court of a foreclosure proceeding against the plaintiff's property on which the defendant bank also holds a mortgage; the defendant bank's maneuvers in connection with the New Jersey case; Judge Briant's restraining order against the New Jersey Court prohibiting the plaintiff from defending itself against certain issues while allowing the defendant bank to prosecute those same issues against the plaintiff; and the interminable debates in the Court below over the separation of issues between the two Courts.

By a studied rearrangement of events, the defendant bank suggests that on February 28, 1975 the District Judge recommended that the plaintiff seek a voluntary discontinuance of this action without prejudice as an alternative to the imposition of harsher sanctions on the plaintiff for failure of its president, Mr. Achee to appear for the concluding portion of his deposition. However, the

defendant bank fails to disclose that the District Judge's recommendation was made in the context of the plaintiff's motion for reconsideration of the restraining order against the New Jersey Court. That order had completely baffled the parties and the presiding judge in the New Jersey proceeding. The record clearly reveals that it was against this background that the District Court recommended that the plaintiff seek a voluntary discontinuance of this action as the only rational way to avoid the bottleneck in the New Jersey foreclosure proceeding created by the restraining order:

> "THE COURT: What do you suggest? Is there any practical way out of this matter? Are you ready to discontinue the action without prejudice? . . ." (A-218)
>
> "THE COURT: . . . I think it has to be said also the end result of litigation in New Jersey ought not to be any different than the end result of litigation here. You have to assume that all the courts are doing justice to the best of their ability and that there is adequate remedy by appellate review in each court.
>
> So you might be very well advised to just discontinue this entire matter without prejudice and go in and fight it out before Judge Wiley. You might be very well advised to do that." (A-220)

The defendant bank states that the plaintiff's motion for voluntary discontinuance was made belatedly and in bad faith after this action had been pending for two years. The defendant fails to mention, however, that this action was stayed for almost nine months from March 14, 1974 to December 3, 1974, on consent of both parties, pending a

determination in the New Jersey foreclosure proceeding of the amount, if any, due on the defendant bank's mortgage. This action had only been restored to the District Court's active docket for three months when, due to the confusion in the New Jersey Superior Court, Judge Brieant suggested that the plaintiff discontinue without prejudice.

The defendant also misrepresents the facts concerning the hearing on the plaintiff's motion for discontinuance held on April 24, 1975 by stating that the plaintiff's counsel had agreed, off the record, to dismissal with prejudice but was later forced to recant by an adamant and absent client. This statement is wholly unfounded. The plaintiff's counsel made it clear to the Court that off the record he had requested a discontinuance without prejudice as to the issue of damages caused by the defendant's breach of the mortgage contract but he had been misunderstood by Judge Brieant. The plaintiff's counsel had tried in vain to correct that misunderstanding by restating his position just before the court reporter was summoned. (A-232). It is unthinkable that the plaintiff would consent to a discontinuance with prejudice of its claim for damages in view of the huge economic losses it suffered as a result of the defendant bank's arbitrary refusal to grant the mortgage releases it had agreed to give in the mortgage contract.

III

THE QUESTION OF THE DISTRICT COURT'S JURISDICTION OVER TRANSITORY ISSUES IS NOT RELEVANT TO THIS APPEAL

The defendant bank also attempts to confuse the issues raised on this appeal by suggesting that the plaintiff sought voluntary discontinuance as a means of "side tracking of jurisdiction in this court over transitory issues involving a national bank headquartered in this district and protected against suit elsewhere under Title 12 U.S.C. Section 94 ... while retaining its litigating posture against the defendant bank in the New Jersey Superior Court. . . . on the transitory issue of mortgage contract validity and breach." These issues to which the defendant refers--whether or not the defendant's mortgage was valid and whether or not the defendant breached that mortgage by refusing to give the plaintiff the requested releases--are the only transitory issues in this action.

The plaintiff did not seek to "sidetrack" the lower Court's jurisdiction by seeking a voluntary discontinuance. On the contrary, the plaintiff, by its offer at the hearing on the motion to discontinue sought to protect the Court's jurisdiction over these transitory issues by stipulating that (i) the mortgage was validly executed and delivered and (ii) that it would not bring any action for

breach of the mortgage in any forum other than one located in New York. Had the plaintiff's motion been granted on these conditions, the Court would have resolved one of the transitory issues and would have insured that the other would be tried in New York.

CONCLUSION

Despite the defendant bank's misrepresentations of fact, its assertion of unsupported charges against the plaintiff and its attempt to confuse this appeal by the introduction of irrelevant issues, the fact remains that the plaintiff's motion for voluntary discontinuance of this action without prejudice should have been granted as the only means of resolving the procedural confusion in this action and in the New Jersey foreclosure proceeding. Mr. Achee's failure to appear on April 28, 1975 for the continuation of his deposition was justified in light of the critical stage of the negotiations in which he was involved abroad and did not warrant the extreme punishment of dismissal with prejudice. At least the plaintiff had the right to be heard as to the circumstances which made it impossible

for Mr. Achee to appear. The actions of the District Court should therefore be reversed.

Respectfully submitted,

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff-Appellant
30 Rockefeller Plaza
New York, New York 10020

Of Counsel:

Richard G. Moser
Paulette M. Caldwell

Dated: October 16, 1975

Copy received 10/16/75
Herman & Cooper
atty for appellee